

JODY McCREARY §
v. § CIVIL ACTION NO. 6:07cv552
DIRECTOR, TDCJ-CID §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Petitioner Jody McCreary, proceeding *pro se*, filed this application for the writ of habeas corpus complaining of the legality of his conviction. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

McCreary complains of a robbery conviction from the 241st Judicial District Court of Smith County, Texas, which was handed down on November 21, 2002. On December 17, 2007, the Magistrate Judge issued a Report recommending that the petition be dismissed as successive. The Magistrate Judge observed that this is the fourth habeas corpus petition which McCreary has filed concerning this same case. *See* cause no.'s 6:06cv167; 6:07cv45; and 6:07cv236. Of these petitions, the first was dismissed as barred by the statute of limitations, and the second and third were dismissed as successive.

The Magistrate Judge further stated that McCreary has not shown that he has received permission from the Fifth Circuit Court of Appeals to file a successive petition, as required by 28 U.S.C. §2244(b)(3), and that on July 11, 2007, he was denied such permission. *See In re: Jody McCreary*, slip op. no. 07-40356 (5th Cir., July 11, 2007). On October 27, 2007, McCreary filed a another request for leave to file a successive petition, which is still pending. Should this request be

granted. McCreary may file an application for federal habeas corpus relief at that time; but until he receives permission to pursue a successive petition, he cannot do so. The Magistrate Judge therefore recommended that McCreary's petition be dismissed and that he be denied a certificate of appealability.

A copy of the Magistrate Judge's Report was sent to McCreary at his last known address, return receipt requested, but no objections have been received; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this case and the Report of the Magistrate Judge. Upon such review, the Court has concluded that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is hereby ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus be and hereby is DISMISSED without prejudice. McCreary may refile the petition at such time as he obtains leave from the Fifth Circuit Court of Appeals to file a successive petition. 28 U.S.C. §2244(b)(3). It is further

ORDERED that the Petitioner Jody McCreary be and hereby is denied a certificate of appealability *sua sponte*, with such denial having no effect upon his right to seek leave to file a successive petition. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So ORDERED and SIGNED this 9th day of January, 2008.

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**